

and loss of amenities at \$4,000. The special damages for loss of earnings was fixed at \$16,800 + \$11,400 = \$28,200. Presumably these figures were adopted by the learned trial judge on submissions made by counsel for the respondent (see page 68 of Record):

"Plaintiff 42 years old now; 37 at time of accident.

Average salary	-	-	-	-	-	-	\$450 p.m.
Coffee money	-	-	-	-	-	-	\$150 p.m.
Total earnings	-	-	-	-	-	-	\$600 p.m.

Able to get about August 1974 — 28 months after accident.
Could not have worked for 28 months —

28 x 600 = \$16,800 — A

August 74 — September 77 — he could have got some sort of work.

No heavy work with one leg — can't drive — suggest light work — stall holders assistant, etc.

Malaysian citizen.

Suppose he earned \$400 — far more than he could have earned.

Loss work — \$300 x 38 months = \$11,400 — B"

Obviously this sum of \$28,400 cannot be allowed to stand. Allowing the total earnings of the respondent at time of accident at \$600 per mensem and, in the absence of evidence as to how long the 2 injuries on their own would have incapacitated the respondent, taking an arbitrary figure of 6 months (respondent's counsel during the appeal suggested that it could be 9 months) as the period the respondent could not have worked, we allow \$3,600 as special damages for loss of earnings. In the circumstances damages of \$33,800 awarded for loss of future earnings cannot stand and are disallowed. The damages awarded to the respondent will therefore be reduced from \$97,000 to \$7,600. The appellants are to have the costs of the appeal and the respondent will be allowed costs in the court below on the Subordinate Court scale.

Appeal allowed.

Solicitors: *S.C. Goho & Co.; Murphy & Dunbar.*

HAW TUA TAU v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Kulasekaram & D'Cotta JJ.)
September 7, 1979]

[Singapore — Criminal Appeal No. 1 of 1978]

Criminal Law and Procedure — Murder — Accused charged on December 13, 1976 — Appealed on conviction as charged — Whether appellant had substantive right to make unsworn statement — Amendment to the law with effect from January 1, 1977 — Criminal Procedure Code (Cap. 113), ss. 181(2), 182 & 186A — Penal Code, s. 302.

Constitutional law — Right of accused to make unsworn statement from the dock — Whether sections 181(2) & 186A, Criminal Procedure Code (Cap. 113), contravene Article 7 of Malaysian Federal Constitution.

The appellant in this case was charged on two separate charges with having caused the death of two named persons in circumstances amounting to murder, an offence punishable under section 302 of the Penal Code. The High Court convicted him as charged and sentenced him to death.

He appealed, *inter alia*, that the High Court erred in applying sections 181(2) and 186A, two recent provisions which were enacted by Parliament and came into operation on January 1, 1977. He claimed that he had a substantive right which accrued to him when he was first charged on December

13, 1976 to make an unsworn statement under the law as it stood before sections 181(2) and 186A came into operation. He further contended that these two statutory provisions were void as being repugnant to article 7 of the Malaysian Federal Constitution which is law in Singapore by virtue of the Republic of Singapore Independence Act, 1965.

Held, dismissing the appeal: (1) before the trial of the appellant the legislature by section 186A of the Criminal Procedure Code had expressly taken away the right of an accused person at his trial to make an unsworn statement from the dock;

(2) the two new sections did not contravene the provisions of Article 7 of the Malaysian Federal Constitution;

(3) there was overwhelming evidence which showed that the appellant intentionally and deliberately inflicted the fatal injuries on two unarmed persons.

[Editorial Note: Appeal to the Privy Council is still pending.]

C Case referred to:-

(1) *Mohamed Salleh v. Public Prosecutor* [1969] 1 M.L.J. 104.

CRIMINAL APPEAL.

Mohideen M.P. Haja Rubin for the appellant.

D *E.C. Foenander* (Deputy Public Prosecutor) for the respondent.

E **Wee Chong Jin C.J.** (delivering the judgment of the Court): On December 12, 1976 the appellant, Haw Tua Tau, caused the death of two persons, Phoon Ah Leong and Hu Yuen Kheng. He was arrested on the same day and on December 13, 1976 he was produced before a magistrate and charged on two separate charges with having caused the death of these two persons in circumstances amounting to murder. Eventually, on March 6, 1978 the appellant was brought before the High Court for trial on these two charges which read as follows:—

First Charge —

F "Haw Tua Tau, you are charged that you on or about the 12th day of December, 1976, at about 6.00 p.m. at Block 40-A, Margaret Drive Hawkers' Centre, Singapore, did commit murder by causing the death of one Phoon Ah Leong, and you have thereby committed an offence punishable under section 302 of the Penal Code (Chapter 103)."

Second Charge —

G "Haw Tua Tau, you are charged that you on or about the 12th day of December, 1976, at about 6.00 p.m. at Block 40-A, Margaret Drive Hawkers' Centre, Singapore, did commit murder by causing the death of one Hu Yuen Kheng, and you have thereby committed an offence punishable under section 302 of the Penal Code (Chapter 103)."

H The High Court convicted the appellant on both charges and sentenced him to suffer punishment by death. He now appeals against his conviction and sentence.

At the close of the prosecution's case the court called upon the appellant to enter upon his defence on both charges. Chua J., the presiding trial judge said:—

I "Will you tell the accused that we find that the prosecution has made out a case against you on both the charges on which you are being tried which if unrebutted would warrant your conviction. Accordingly, we call upon you to enter upon your defence on both the charges.

Before any evidence is called for the defence we have to inform you that you will be called upon by the court to give evidence in your own defence. You are not entitled to make a statement without being sworn or affirmed and accordingly if you give evidence, you will do so on oath or affirmation and be liable to cross-examination. If after being called by

the court to give evidence you refuse to be sworn or affirmed or having been sworn or affirmed, you, without good cause, refuse to answer any question, the court in determining whether you are guilty of the offence charged, may draw such inferences from the refusal as appear proper.

There is nothing in the Criminal Procedure Code which renders you compellable to give evidence on your own behalf and you shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed when called upon by the court to give evidence. We now call upon you to give evidence in your own defence. If you have any difficulty in deciding whether or not you wish to give evidence on your own behalf you may consult your counsel."

The appellant elected to make his defence on oath.

When the trial commenced the relevant provisions governing the procedure relating to criminal trials before the High Court are contained in the following sections of the Criminal Procedure Code (Cap. 113) namely:—

"S. 181(1) When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence.

(2) Before any evidence is called for the defence, the court shall tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect will be if, when so called upon, he refuses to be sworn or affirmed, and thereupon the court shall call upon the accused to give evidence.

S. 182(1) The accused or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution.

(2) He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

(3) If any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence.

(4) Any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(5) The accused shall be allowed to examine any witness not previously named by him under the provisions of this Code if that witness is in attendance.

S. 186A(1) In any criminal proceedings except an inquiry preliminary to committal for trial, the accused shall not be entitled to make a statement without being sworn or affirmed, and accordingly, if he gives evidence, he shall do so on oath or affirmation and be liable to cross-examination; but this subsection shall not affect the right of the accused, if not represented by an advocate, to address the court otherwise than on oath or affirmation on any matter on which, if he were so represented, the advocate could address the court on his behalf.

(2) If the accused —

(a) after being called upon by the court to give evidence or after he or the advocate representing him has informed the court that he will give evidence, refuses to be sworn or affirmed; or

(b) having been sworn or affirmed, without good cause refuses to answer any question,

the court, in determining whether the accused is guilty of the offence charged, may draw such inferences from the refusal as appear proper.

(3) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed in the circumstances described in paragraph (a) of subsection (2).

(4) For the purposes of this section a person who, having been sworn or affirmed, refuses to answer any question shall be taken to do so without good cause unless —

(a) he is entitled to refuse to answer the question by virtue of sub-section (4) of section 120 of the Evidence Act or

A any other written law or on the ground of privilege; or
(b) the court in the exercise of its discretion excuses him from answering it.

(5) Nothing in subsection (2) shall apply to an accused if it appears to the court that his physical or mental condition makes it undesirable for him to be called upon to give evidence."

B Section 181(2) and section 186A are recent provisions which were enacted by Parliament and assented to by the President on August 24, 1976 by an Act entitled the "Criminal Procedure Code (Amendment) Act, 1976" which Act came into operation on January 1, 1977.

The appellant contends that there has been a miscarriage of justice in that the High Court erred in applying these two recent additions to the Criminal Procedure Code which were not the law of the land when he was first charged before a court on the two charges on which he was subsequently tried and convicted by the High Court. The submission is that the appellant had a substantive right which accrued to him when he was first charged on December 13, 1976 to make an unsworn statement under the law as it stood before section 181(2) and section 186A came into operation on January 1, 1977 and that these two new sections could not have the retrospective effect of depriving him of his accrued substantive right. It is submitted that the High Court when calling on the appellant to enter on his defence should have drawn his attention to his right to make an unsworn statement instead of warning him that he was not entitled to make a statement without being sworn or affirmed.

Mr. Rubin, on behalf of the appellant, in support of his submission relies on the decision of this court in *Mohamed Salleh v. Public Prosecutor*⁽¹⁾ where at page 105 the court stated:—

F "In our judgment, the right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code. It seems to us beyond doubt that under our system of administration of justice, and it has been so throughout the entire history of our courts, a person accused of a criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. In our view this right can be taken away only by an express statutory provision to that effect."

G In that case the submission on behalf of the appellant was that as there was no specific provision in the Criminal Procedure Code for an accused person at his trial to make an unsworn statement from the dock, it was an irregularity for the trial judge to tell the appellant that he had a choice of either giving evidence on oath from the witness box or making an unsworn statement from the dock. The court rejected that submission on the ground that at his trial an accused person has the right to make an unsworn statement from the dock if he wishes to do so even if there is no specific provision for it in the Criminal Procedure Code.

I In our opinion, it is clear from the passage at page 105 we have cited that this court in *Mohamed Salleh's* case was of the view that the right of a person charged with a criminal offence to make an unsworn statement from the dock is a right which vests in him "at his trial". In the present case, before the trial

of the appellant the legislature by section 186A of the Criminal Procedure Code, which section came into operation on January 1, 1977, had expressly taken away the right of an accused person at his trial to make an unsworn statement from the dock. In our opinion when the trial of the appellant commenced in March 1978 the procedural provisions of section 186A governed the trial.

Another contention advanced on behalf of the appellant is that if the present section 181(2) and section 186A had retrospective effect so as to deprive the appellant of his right to make an unsworn statement from the dock or to remain silent, rights which accrued to him when he was first charged on December 13, 1976, then these two statutory provisions are void as being repugnant to Article 7 of the Malaysian Federal Constitution which is law in Singapore by virtue of the Republic of Singapore Independence Act, 1965.

Article 7 of the Malaysian Federal Constitution reads:—

"7. Protection against retrospective criminal laws and repeated trials.

(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted."

Having regard to the opinion we have expressed on the first contention of the appellant this contention must also fail. In any event these two new sections plainly do not contravene the provisions of Article 7.

Although the Petition of Appeal raises numerous grounds of appeal which are related to the evidence before the trial judges and their verdict of guilty, these grounds have not been seriously pressed in argument at the hearing of the appeal. Nevertheless, we have gone through the entire Record of Appeal with considerable care and are satisfied that the evidence was overwhelming against the appellant. The evidence disclosed that the appellant intentionally and deliberately inflicted the fatal injuries on two unarmed persons. There were independent eye-witnesses to these brutal killings whose evidence the trial judges accepted. The trial judges rejected the appellant's defence that he was not aware that he had a bearing scraper in his hand and that the injuries he inflicted were accidental.

Accordingly, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Amarjit, Rubin & Partners.*

**U.N. PANDEY v.
HOTEL MARCO POLO PTE. LTD.**

[O.C.J. (Sinnathuray J.) March 29 & April 9, 1979]

[Singapore — Civil Suit No. 495 of 1977]

Evidence — Burden of proof — Civil cases — Party must prove case before burden shifts — Balance of probabilities in civil case.

A *Practice and Procedure — No case to answer — Saving of costs, and time.*

In civil cases, as much as in criminal cases, a party must prove his case before the burden of proof shifts to the other side. In a criminal case the prosecution's burden is a heavy one. In a civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.

B **Held:** it would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiff's case, without putting the defendant to his election, whether to call evidence or not, if his submission fails. Such a practice will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the hearing. Altogether the practice will bring about a saving of costs for the parties.

Case referred to:—

C (1) *Storey v. Storey* [1961] P. 63 C.A.

CIVIL SUIT.

J.B. Jeyaretnam for the plaintiff.

T.T. Durai for the defendants.

Sinnathuray J. (delivering oral judgment): Under section 3(3) of the Evidence Act, "A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." Then sub-section 4 deals with "disproved". Finally sub-section 5 says "A fact is said to be 'not proved' when it is neither proved nor disproved."

F It is not often realised that in civil cases, as much as in criminal cases, a party must prove his case before the burden of proof shifts to the other side. In a criminal case the prosecution's burden is a heavy one. In a civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.

G In this case, after four days of hearing, I invited Mr. Durai for the defendants to address me this morning on the facts. He submits that the plaintiff and his material witnesses are not to be believed. Taken somewhat by surprise, as he may have been, counsel for the defendants, has nevertheless given instances from the evidence of the material witnesses to support his submission.

H In reply, counsel for the plaintiff says that it is obvious that I have made up my mind on the evidence of the witnesses, and therefore he would not submit on the facts. He then submits that there is some confusion in the submission of counsel for the defendants. It is said he has overlooked the main question for decision in this case. The question is: Was there an extension of time given by the defendants? It is correct that that is the issue.

I Now, in determining that issue what evidence have we got? Counsel for the plaintiff says that the credibility of witnesses is not an issue at this stage. With respect, I altogether disagree with him. Credibility of the evidence of the material witnesses is very much in issue on the question for determination. Counsel for the plaintiff contends that the evidence of the witnesses must be viewed after the consideration of the whole of the case. What Mr. Durai has submitted is that when one considers the totality of the plaintiff's